EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(3)

No. 04-44

IN THE

Supreme Court of the United States

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

Petitioner,

v.

THOMAS RAMSEY,

Respondent.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals

LODGING FOR THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

LOUIS P. WARCHOT
DANIEL SAPHIRE *
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W
Washington, D.C. 20001
(202) 639-2505

Counsel for Amicus

* Counsel of Record

July 29, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

RECEIVED
JUL 29 2004
OFFICE OF THE CLERK
SUPREME COURT, U.S.

TABLE OF CONTENTS

Page

1. *Butcher v. Soo Line R.R. Co.*, No. TH 00-83-C-H/M (S.D. Ind. 2001)..... 1

2. *Williamson v. CSX Transp., Inc.*, No. 02-04834 CA (Cir. Ct. Fla. 2004)..... 11

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

TERRY BUTCHER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cause No. TH 00-83-C-H/M
	)	
SOO LINE RAILROAD COMPANY,	)	
d/b/a CANADIAN PACIFIC RAILWAY,	)	
	)	
Defendant.	)	

ORDER ON DEFENDANT'S MOTIONS *IN LIMINE*

This matter is before the court on the Defendant's Motions *in Limine* and Brief in Support filed June 5, 2001. (Docket Item 30). Plaintiff filed its Response on July 9, 2001. (Docket Item 37). Defendant filed its Reply in Support of Its Motions *in Limine* on July 16, 2001. (Docket Item 40).

The defendant seeks an order excluding testimony as to three matters. They are:

(1) to exclude testimony from plaintiff's treating physicians with regard to "cause" of plaintiff's injury, the permanency of his "disability," and his "future pain and suffering" due to failure to provide a report required pursuant to Federal Rule of Civil Procedure 26;

(2) to exclude purported expert opinions of Dr. Lewis Grossman, Ph.D., concerning plaintiff's lost future wages, and his alleged impaired future earning capacity due to Dr. Grossman's failure to properly take into account certain taxes which would have been payable upon any future railroad earnings by plaintiff – namely, railroad retirement taxes which would have been deducted from plaintiff's gross earnings; and

RECEIVED AUG 0 7 2001

(3) to exclude reports and evidence of complaints concerning End of Train devices in locomotive cabs which post-date plaintiff's March 1998 incidents.

1. Exclusion of Dr. Schreiber's Opinions:

The plaintiff's complaint alleges two counts of negligence under the FELA and two counts of liability under the Boiler Inspection Act. All four counts are based on two incidents in which the plaintiff tripped over an End of Train telemetry device.

The plaintiff has identified Dr. Schreiber as one of plaintiff's "treating physicians" who will testify as to the cause and extent of plaintiff's injuries, disabilities, pain and suffering.

The defendant moves to exclude the testimony regarding the cause of plaintiff's injury, the permanency of his disability, and his future pain and suffering because Dr. Schreiber did not provide a report as required by Federal Rule of Civil Procedure 26(a)(2). The issue of whether a treating physician is an expert for purposes of Rule 26(a)(2) is an issue which courts and parties have been struggling with for some time. The most recent Seventh Circuit case cited to this court discussing the issue indicates that when a treating physician wishes to testify regarding the cause of a plaintiff's injury, he is attempting to testify as an expert and is required to comply with Rule 26(a)(2). *See Richardson v. Consolidated Rail Corp.*, 17 F.3d 213, 218 (7th Cir. 1994). The testimony of the treating physician which goes beyond his own observations to include opinions as to what caused the medical condition to occur and the length of time

for which the injury will continue to exist and cause pain are opinions which fall under Rule 702 of the Federal Rules of Evidence because they are scientific or other specialized knowledge which will assist the trier of fact to understand the evidence. Under Rule 26(a)(2)(B), a witness who is retained or specially employed to provide expert testimony in the case requires disclosure accompanied by a signed written report of the witness. While treating physicians certainly treat an individual and maintain records of that treatment, they do not, in this court's experience, agree to provide testimony in court cases unless they are specially employed to do so. Therefore, generally speaking, treating physicians who wish to give these types of opinions must file the necessary written disclosures.

However, Rule 26(a)(2)(B) further provides "except as otherwise stipulated or directed by the court," these disclosures must be made. In this case, the parties have stipulated in their Case Management Plan (Docket Item 10), at section III(e), that the provisions of Federal Rule of Civil Procedure 26(a)(2) do not apply to treating physicians unless the plaintiff was referred to the physicians by his attorneys, and that such witnesses are not expert witnesses within said rule.

In the materials provided to the court, Dr. Schreiber writes a letter indicating that he began caring for the plaintiff on March 15, 1999, approximately one year after the incidents in question. The letter does not establish whether the plaintiff was referred to Dr. Schreiber by his attorneys. If the plaintiff was not so referred by his attorneys, then

Dr. Schreiber is a treating physician, and by stipulation of the parties may testify notwithstanding the failure to provide the report.

If the plaintiff was referred to Dr. Schreiber by his attorneys, then the parties in their Case Management Plan appear to have contemplated that such expert testimony would be required to be supported by a Rule 26(a)(2) disclosure. He has not provided such a report.

What is the legal consequence of such a failure? Federal Rule of Civil Procedure 37(c) provides, in part:

> A party that without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure is harmless, permitted to use as evidence at a trial . . . information not so disclosed.

The plaintiff does not suggest that there is "substantial justification" for failing to disclose the information. When the parties prepared their Case Management Plan, they obviously contemplated that disclosures would be required of certain categories of witnesses, one of which was treating physicians who had been referred by the plaintiff's attorneys. The more difficult question is whether the failure is "harmless," as stated in the rule. The plaintiff does argue that the defendant was aware of the existence of the treating physician, and had copies of his records which contained the treating physician's opinions. The plaintiff further argues that the defendant had the opportunity to depose that treating physician, but declined to do so.

This court cannot conclude that the failure to provide the disclosures is harmless based on the information before the court. The purpose of Federal Rule of Civil Procedure 26(a)(2) is to require that an expert provide a report – prior to his/her deposition – that contains a complete statement of all opinions to be expressed and the basis and reasons therefor. He or she must also provide the data or other information considered by the witness in forming the opinions, exhibits to be used as a summary or in support of the opinions, and the qualification of the witness, among other things. The opposing party who has received notes of a treating physician which contain some opinions cannot be certain that those notes and records contain a complete statement of all opinions to be expressed and the reasons therefor, and may not be in a position to evaluate whether a deposition is warranted or not. The disclosures required by the rule do serve a purpose. That purpose is to determine when an expert must be deposed prior to trial, and when an expert opinion is so reasonably clear and based upon reasonable facts that no further deposition is necessary. The defendant's decision not to depose the physician in this case may have been made in part because all of the physician's opinions were not completely disclosed in his/her report.

The plaintiff also argues that the omission is harmless because the opinions of Dr. Schreiber parallel those of the defendant's physician, Dr. Coscia. However, the fact that there is other evidence on a particular issue does not, in this court's opinion, render failures to comply with the rules to be harmless. Each piece of evidence must be

evaluated according to its own merits. This court's full reading of the "worker's compensation note" by Dr. Coscia does not convince the court that Dr. Schreiber's testimony is merely cumulative of other evidence which will clearly be made of record before the jury in this case.

This court therefore concludes that if the plaintiff was referred to Dr. Schreiber by his attorneys, the defendant's motion *in limine* striking Dr. Schreiber's opinions as to causation and permanency of plaintiff's conditions should be granted. Federal Rule of Civil Procedure 37(c) provides that in addition to or in lieu of the sanction of denying the use of evidence at trial, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. The court notes that striking testimony is an extreme sanction which generally ought not to be employed if there are other available sanctions. In the event that the plaintiff files such a motion as required by the rule, and agrees to provide the appropriate disclosure in a timely fashion and to continue the trial date until such a point in the time as the defendant has reasonable opportunity to determine whether they wish to depose the physician and obtain rebuttal expert testimony, then the court may reconsider the granting of this motion.

Conclusion to Issue 1

The court is unable to resolve this portion of the defendant's motion *in limine* without further information. If the plaintiff was referred to Dr. Schreiber by the plaintiff's attorneys, then the defendant's motion *in limine* is **GRANTED.** In the event the

plaintiff was not referred to Dr. Schreiber by the plaintiff's attorneys, then the defendant's motion *in limine* is **DENIED.**

2. Dr. Grossman's Economic Testimony:

Lewis Grossman, Ph.D., prepared an opinion attempting to address the plaintiff's future wage loss. In creating that opinion, he failed to deduct out from the plaintiff's gross income Tier 1 and Tier 2 taxes that are withheld from the plaintiff's gross income. Dr. Grossman concludes that such withholdings are "not really a tax." (Tr. at 22). Dr. Grossman does, however, admit that the Tier 1 and Tier 2 railroad retirement pension contributions create a defined benefit plan. As such a defined benefit plan, the contributions which the plaintiff makes are not segregated in a particular account for his use only. Rather, they are, like social security, amounts withheld to fund the system generally.

Case law has concluded that railroad retirement taxes are indistinguishable from any other federally imposed tax, including social security taxes. *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 99 S.Ct. 802, 204-05 (1979) ("both employees and carriers pay a federal tax which funds a railroad retirement account. . . . [L]ike a social welfare or insurance scheme, the taxes paid by and on behalf of an employee do not necessarily correlate with the benefits to which the employee may be entitled. . . . [L]ike social security, and unlike most private pension plans, Railroad Retirement Benefits are not contractual. Congress may alter, and even eliminate them at any time." (Footnotes

omitted)); *Wallers v. U.S.*, 847 F.2d 1279, 1281 (7th Cir. 1988) (noting that the railroad retirement program is in lieu of the social security system, and that it is "funded through payroll taxes. . . .").

The parties do not contest that in determining the plaintiff's pecuniary loss, the correct measure of damages is the claimant's after-tax income, rather than his gross income before taxes. *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, *rehrg. denied*, 445 U.S. 972 (1980).

This court concludes that the opinion of Dr. Grossman which does not consider Tier 1 and Tier 2 contributions as "taxes," and does not calculate an "after tax" loss considering these contributions as taxes, is in error. Such an erroneous opinion will leave the jury confused because they will be given an incorrect measure of damages.

Conclusion to Issue 2

Dr. Grossman's opinion, which fails to properly take into account the effect of these taxes, will be misleading to the jury. The defendant's motion *in limine* with respect to his opinion is **GRANTED.**

3. Reports and Evidence Concerning End of Train Devices Which Post-Date Plaintiff's March 1998 Incidents:

The defendant moves to exclude any evidence or reference of safety meetings held on dates after the plaintiff's injuries. Defendant argues that safety concerns after

the incidents at issue are subsequent remedial measures and not admissible at trial under Federal Rule of Evidence 407.

The plaintiff argues that he brings claims under the Boiler Inspection Act ("BIA"). At issue under the BIA is whether or not the End of Train ("EOT") devises left on the cab floor result in a "tripping hazard." Plaintiff argues that subsequent complaints and discussions about the EOT devices left on the engine, and whether they are a tripping hazard, are relevant and probative of plaintiff's strict liability claim.

Federal Rule of Evidence 407 provides in its entirety:

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion or evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The court concludes that minutes of safety committee meetings after the events in question are not admissible to prove "negligence" (under the FELA claim) or "culpable conduct" or a "need for warning or instruction" (under the BIA claim). At this time, the plaintiff has not demonstrated that there is any defense raised that the EOT devices were not owned or controlled by the railroad, nor has the railroad raised as a defense that it is not feasible to take any precautionary measures such as moving the devices to another location on the train. Under this state of the record, the defendant's motion *in limine* must be granted, at least conditionally. Should the railroad defend at trial on the basis

that there is no other feasible manner to store the devices, then the safety committee minutes may become relevant and admissible under the rule. However, until the defendant opens the door, no reference shall be made by counsel or the witnesses.

Conclusion to Issue 3

The defendant's motion *in limine* is **CONDITIONALLY GRANTED** as described above. The defendant is **DIRECTED** to bring copies of the minutes to trial so that they are available, if necessary.

SO ORDERED the 6 day of August, 2001.

William G. Hussmann, Jr., Magistrate Judge
United States District Court
Southern District of Indiana

Copies to:

Roger C. Denton
Schlichter Bogard & Denton
100 S. 4th St., #900
St Louis, MO 63102

John C. Duffey
Stuart & Branigin
P.O. Box 1010
Lafayette, IN 47902-1010

John T. Roach
Mann Law Firm
646 Walnut Street
P.O. Box 1643
Terre Haute, IN 47808-1643

IN THE CIRCUIT COURT FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 02-04834 CA
DIVISION: CV-H

GLORIA V. WILLIAMSON, Individually
and as Executrix of the Estate
of CARL WILLIAMSON, deceased,

Plaintiff,

vs.

CSX TRANSPORTATION, INC.,

Defendant.
_____/

ORDER ON DEFENDANT, CSX TRANSPORTATION, INC.'S MOTION TO STRIKE AND MOTION IN LIMINE REGARDING TESTIMONY OF DR. ROBERT COSTON

THIS CAUSE came to be heard on Defendant, CSX Transportation, Inc.'s Motion to Strike and/or Motion in Limine regarding the testimony of Robert Coston, Ph.D. and the Court having heard reviewed the Motion and deposition of Dr. Robert Coston, heard argument of counsel and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED:

1. This wrongful death lawsuit was brought under the provisions of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51 et seq. alleging that Plaintiffs decedent, Carl Williamson died as a result of esophageal cancer caused by his occupational exposure to asbestos during the course of his employment as a sheet metal worker/pipefitter for Defendant and its predecessor railroads.

2. Plaintiff timely disclosed an economic expert, Dr. Robert Coston, Ph.D., who formerly served as a Professor and Chairman of the Department of Economics at Georgia Southern University. Dr. Coston prepared an economic loss report and offered deposition testimony regarding damages suffered by Plaintiff as a result of the death of Carl Williamson. Defendant has not challenged the expert credentials of Dr. Coston.

3. Defendant moved to strike or limit portions of Dr. Coston, Ph.D.'s testimony based upon (1) Dr. Coston's failure to deduct Mr. Williamson's personal consumption expenses from his economic loss calcuktions; (2) Dr. Coston's failure to deduct Tier I and Tier II Railroad Retirement taxes from his past and future economic loss calculations; (3) Dr. Coston's use of U.S. Government statistics to calculate lost value of services and (4) Dr. Coston's calculation of lost fringe benefits based upon a percentage of Mr. Williamson's salary.

4. With respect to the issue of personal consumption, the Court finds that the decedent's personal consumption must be deducted from any economic loss calculations in a FELA wrongful death case. Norfolk & Western Railroad Company v. Liepelt, 444 U.S. 490, 62 L.Ed.2d 689, 100 S.Ct. 755 (1980); Matador v. Ingraham Tank Ships, 732 F.2d 475 (5th Cir. 1984); Tallentire v. Offshore Logistics, Inc., 754 F.2d 1274 (5th Cir. 1985); Kenney v. Tallulah Falls Railway Co., 105 S.E. 712, 26 Ga. App. 215 (Ga. App. 1921) and Davis v. Seaboard Air Line Railway Co., 80 S.E. 1078, 165 N.C. 99 (N.C. App. 1914).

5. The Court also finds that Dr. Coston, Ph.D. must deduct Tier I and Tier II Railroad Retirement taxes from his economic loss calculations.

6. In Norfolk & Western Railroad Company v. Liepelt, 444 U.S. 290, 62 L.Ed.2d 689, 100 S.Ct. 755 (1980) the United States Supreme Court held that net income after taxes is the true measure of damages in a FELA case.

7. Pursuant to the Railroad Retirement Act of 1974, 45 U.S.C. §231 et seq., the Railroad Retirement Board administers disability and retirement annuities for railroad workers. Under federal law, railroad employees and employers are required to pay a percentage of an employee's gross wages as Tier I and Tier II taxes in order to fund disability and retirement annuities for railroad workers. The Tier I and Tier II taxes supplant social security.

8. The Court finds that Dr. Coston, Ph.D. must deduct government mandated Tier I and Tier II Railroad Retirement taxes from his economic loss calculations and further finds that Defendant's portion of Tier I and Tier II taxes do not constitute a fringe benefit. Rachel v. Consolidated Rail Corp.. 891 F.Supp. 428 (N.D. Ohio 1995). The Court also finds that Mr. Williamson may have qualified for a larger pension benefit but for his death and will allow Dr. Coston to offer testimony regarding the value of Mr. Williamson's lost pension benefits, if calculated in a manner consistent with 45 U.S.C. §231b(b).

9. The Court disagrees with Defendant's contention that Dr. Coston must base his calculations for lost value of services on factual information specific to Mr. Williamson. Dr. Coston has assumed that Mr. Williamson would have provided ten hours of household services based upon published Department of Agriculture statistics for full-time workers. Defendant's argument goes to the weight of the evidence and not its admissibility.

10. With respect to the issue of lost fringe benefits, Dr. Coston assumed that Mr. Williamson's benefit package with Defendant had a value of twenty-five percent of Mr. Williamson's gross wages. There was no evidence supporting this assumption, although Dr. Coston did have a 1997 document prepared by Defendant suggesting that the cost of Mr. Williamson's medical and other benefits was $6,400. Under the FELA, Plaintiff would be entitled to recover the actual cost of replacing medical and other benefits provided by CSXT, assuming those benefits were terminated

as a result of Mr. Williamson's death. Dr. Coston, is not permitted to calculate the value of lost fringe benefits based upon a percentage of Mr. Williamson's salary unrelated to the actual cost of replacing medical and other benefits. Dr. Coston may use the $6,400 figure provided by CSXT as relevant evidence of the cost of replacing fringe benefits.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida this 23rd day of April, 2004.

/s/ JAMES L HARRISON
SENIOR CIRCUIT JUDGE
SUPREME COURT ORDER 2004R-041

Hon. James L. Harrison
Senior Circuit Judge

Copies furnished to:

Counsel of Record